IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1527 of 2001
WITH
CIVIL APPLICATION No 5466 of 2004
WITH
COMPANY PETITION No 131 of 1990
WITH
COMPANY PETITION No 132 of 1990

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NARMADA ALUMINIUM INDUSTRIES LTD

Versus

APPELLATE AUTHORITY FOR INDUSTRIAL AND FINANCIAL RECO.

Appearance:

1. Special Civil Application No. 1527 of 2001
MR ASHOK L SHAH WITH
MR PAVAN S GODIAWALA for Petitioner No. 1
SERVED BY RPAD - (R) for Respondent No. 1-2,6
NOTICE SERVED for Respondent No. 2,5,8
GOVERNMENT PLEADER for Respondent No. 3
MR BHARAT JANI for Respondent No. 4
DR SONIA HURRA for Respondent No. 7

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 25/04/2005

COMMON ORAL JUDGEMENT

Special Civil Application No. 1527 of 2001 is filed by the Company, namely, Narmada Aluminium Industries Limited challenging the order passed by the Board for Industrial and Financial Reconstruction (for short 'BIFR') on 01.09.2000 in Reference Case No. 15 of 1991 and the order passed by the Appellate Authority for Industrial and Financial Reconstruction (for short 'AAIFR') on 02.01.2001 in Appeal No. 327 of 2000.

2. This Court has passed an order on 02.11.2001 admitting the said petition and interim relief in terms of para 21 (c) was granted till the final disposal of the petition. By virtue of the said interim relief, the operation and implementation of the order passed by BIFR dated 01.09.2000 was stayed.

3. Civil Application No. 5466 of 2004 is filed by the applicant, namely, Industrial Development Bank of India, the original respondent No.4 in S.C.A. No. 1527 of 2001 for vacating the interim relief granted by this Court by an order dated 02.11.2001 in S.C.A. No. 1527 of 2001.

4. This Court has passed an order on 30.07.2004 and observed that it is better to hear S.C.A. No. 1527 of 2001 itself instead of proceeding further with the C.A. No. 5466 of 2004. At the joint request of the parties, all the aforesaid matters were fixed for final hearing and this is how all these matters are taken up for final hearing.

5. Company Petition No. 131 of 1990 is filed by the petitioning Creditor, namely, Pankaj Aluminium Industries under Section 433 and 434 of the Companies Act, 1956 for winding up of the respondent Company on the ground that the respondent Company has failed and neglected to pay a sum of Rs.32,86,191/-.

6. Similarly, Company Petition No. 132 of 1990 is filed by the petitioning Creditor, namely, Aluminium Extrusion Centre under Section 433 and 434 of the Companies Act, 1956 for winding up of the respondent Company on the ground that the respondent Company has

failed and neglected to pay a sum of Rs.3,71,895.62 ps.

7. Company Petition Nos. 131 and 132 of 1990 are pending before this Court since 1990 as the reference filed by the respondent Company was pending before BIFR. This Court has passed an order on 12.12.2003 in Company Petition Nos. 131 & 132 of 1990 wherein it is recorded that the respondent Company made an application to BIFR under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'SICA') and the BIFR registered the case as Reference Case No. 15 of 1991 vide its order dated 05.02.1991. The BIFR vide its order dated 01.09.2000 came to the conclusion that it is just and equitable and in public interest that the respondent Company be wound up under Section 20 (1) of the SICA and forwarded the said opinion to this Court. Being aggrieved by the said order dated 01.09.2000, the respondent Company preferred appeal being Appeal No. 327 of 2000 before AAIFR which was dismissed by AAIFR on 02.01.2001. Being aggrieved by the said order, the respondent Company has preferred S.C.A. No. 1527 of 2001 before this Court and since the said petition is pending before this Court, both these Company Petitions were adjourned from time to time.

8. In view of the above facts and circumstances of the case, it is necessary to decide S.C.A. No. 1527 of 2001.

9. Mr. A.L. Shah, learned advocate appearing with Mr. Pavan S. Godiawala for the petitioner in S.C.A. No. 1527 of 2001 has submitted that the petitioner Company was incorporated on 15.04.1981 to manufacture aluminium extrusion. The petitioner Company was having its plant at Bholav village in Bharuch District and the capacity of the plant was 3,000/- MT p.a. which was enhanced to 5,000/- MT. On account of various reasons beyond the control of the Company, it became a Sick Industrial Company within the meaning of the SICA and filed its reference under Section 15 of SICA before the BIFR. The said reference was registered as Reference Case No. 15 of 1991. The BIFR after hearing the parties, by its order dated 30.05.1991 declared the petitioner to be a Sick Industrial Company within the meaning of SICA and appointed IDBI as the Operating Agency under Section 17 (3) of SICA and directed it to examine the technical and economic viability of the petitioner Company and submit its report. The IDBI submitted his report before the BIFR and after hearing all the parties, prepared a draft resolution Scheme and ultimately, the BIFR had sanctioned the Scheme on

07.04.1992. However, on account of various reasons beyond the control of the petitioner, the rehabilitation Scheme could not work successfully and the Scheme was declared as failed in 1995.

10. Mr. Shah has further submitted that the BIFR reappointed the IDBI as the Operating Agency under Section 18 (5) of the Act and directed it to prepare a Rehabilitation proposal for the petitioner. The Operating Agency submitted its report and after detailed considerations and after taking into consideration suggestions of all parties concerned, the BIFR sanctioned the revised Scheme on 31.10.1996. The said Scheme also could not be fully implemented on account of reasons beyond the control of the petitioner. The said revised scheme envisaged one time settlement of the dues of the Secured Creditors by bringing certain funds for the purpose by the petitioner / promoters. The petitioner / promoters brought in very substantial funds and paid up the same to the Secured Creditors. However, on account of severe recession in the property market, they could not sell of some of their immovable properties which they were trying to liquidate and pay up the balance amount of the one time settlement proposal from the sales realisation thereof. Those facts were pointed out to BIFR vide petitioner's letter dated 07.10.1998. A joint meeting was convened by the Operating Agency on 15.04.1999 to review the status of the rehabilitation process and decide the future course of action. The Operating Agency by its letter dated 25.05.1999 addressed to BIFR that the petitioner Company was yet to submit its fresh proposal. Thereafter, hearing was taken place on 29.10.1999 wherein the BIFR reviewed the progress of the scheme sanctioned on 31.10.1996. The BIFR took note of the fact that although the petitioner Company had achieved higher production on account of reduction in unit sales realisation, increase in input costs, depressed market conditions, etc, the petitioner Company incurred cash losses. The BIFR also observed that the petitioner Company had made down payment of Rs.158 Lacs in December 1996 and allotted shares for Rs.20 Lacs in February 1997. The Company had also paid Rs.40 Lacs by December 1997 towards current interest. However, there was default in payment of accrued interest and balance amount of One Time Settlement installments. The Company, however, informed BIFR that the promoters were in the process of liquidating their assets to generate sufficient funds for payment of the balance amount of the One Time Settlement Proposal to the financial institutions and Banks and that some time may be given for that purpose. However, BIFR questioned the promoters

whether they would be able to bring the amount within 15 days, knowing fully well that such a huge amount could not be collected within such a short time nor the immovable properties could be sold of within such a short time. As the promoters expressed their inability to bring such huge amount within such short time, the BIFR declared the scheme sanctioned on 31.10.1996 as failed and directed the Operating Agency to issue advertisement for change of management.

11. Pursuant to the advertisement issued, the promoters of the petitioner Company had also submitted proposal and deposited with the Operating Agency an amount of Rs. 1 Lacs towards the cost of advertisement. The revised rehabilitation proposal assumed the cut-off date as June 30, 2000. The dues of financial institutions and Banks were taken as Rs. 533 Lacs and after taking into consideration the amount of Rs.222.36 Lacs, the balance outstanding principal amount remained to be paid. The said proposal laid down the mode and schedule of payment of the said balance amount. Thereafter, the BIFR ex-parte issued an order on 26.06.2000 observing that only one proposal from the existing management was received in response to the advertisement issued by the Operating Agency for change of management. The BIFR hence concluded that the Company / promoters did not appear to be serious or resourceful enough to revive the Company and the BIFR came to a prima facie opinion that it is just, equitable and in public interest that the petitioner Company be wound up under Section 20 (1) of SICA. The BIFR had also directed to issue show-cause notice as to why the prima facie opinion should not be confirmed that the Company be wound up. It is alleged that the said order dated 26.06.2000 was passed by BIFR without giving an opportunity to the petitioner of being heard and thus the said order was in violation of the principles of natural justice.

12. After issuance of the aforesaid notice for winding up of the Company, the petitioner continued with its effort to revive the Company and held discussions with financial institutions to somehow revive the Company. In this direction, the promoters / Company submitted their revised proposal vide their letter dated 22.08.2000. The revised proposal assumed the cut-off date as 31.12.2000 with one time settlement of the principal amount of Rs. 576 Lacs after reducing the amount of earlier payments / conversion into equity of Rs. 222.36 Lacs i.e. balance of Rs. 354.64 Lacs. In the revised proposal, the each component had been increased to 75% from 50% in the earlier proposal.

However, the payment of Rs. 265.23 Lacs being 75% was proposed to be paid in six equal quarterly installments, the first installment to be paid within 30 days after sanction of the Scheme. The remaining 25% i.e. Rs.88.41 Lacs was proposed to be converted into equity shares at face value of Rs. 10 per share with buy back arrangement with promoters at face value of Rs. 10 per share or market price whichever is higher at the end of 3rd and 4th years in two equal installments.

13. The petitioner had followed the above proposal very vigorously with the Operating Agency and after many meetings, the petitioner was given to understand by the Operating Agency that the financial institutions and Banks were agreeable in principal to the said one time settlement proposal dated 22.08.2000 and the petitioner was advised to show its bonafide and for that purpose, it should make an upfront deposit of Rs. 50 Lacs in a no lien account before the next date of BIFR hearing which was fixed on 01.09.2000. The time available with the Company / Promoters was very short, hardly about one week, to make the payment of the huge amount of Rs. 50 Lacs. However, the Company / Promoters immediately deposited Rs. 28 Lacs with IDBI, the Operating Agency in a no lien account and assured that the balance amount of Rs. 22 Lacs would be paid within four days after hearing of the BIFR on 09.01.2000. However, the BIFR pressurising the financial institutions and questioned them as to how they have accepted such a proposal and thereafter recorded the observations that as per the proposal, the company had afforded to pay 75% of the principal amount in six quarterly installments and the balance 25% by conversion in equity and inspite of the financial institutions and Banks having agreed to the proposal envisaging one time settlement of the dues, has confirmed its prima facie opinion that the Company be wound up under Section 20 (1) of the Act by its order dated 01.09.2000.

14. Being aggrieved by the said order of the BIFR dated 01.09.2000, the Company preferred an appeal being Appeal No. 327 of 2000 to the AAIFR and before the Appellate Authority, the petitioner has again pointed out that though financial institutions and Banks were agreeable in principle to accept the petitioner's one time settlement proposal, BIFR had not granted sufficient time and opportunity to finalise the rehabilitation scheme on the basis of the said one time settlement. The AAIFR, however, proceeded on the basis that at the time of hearing before BIFR, no agreement could be reached between the Company and the Financial Institutions /

Banks. The Financial Institutions / Banks were prepared to accept 100% of the principal dues in cash which the Company/promoters were not prepared to ensure. Mr. Shah has further submitted that AAIFR has failed to appreciate that the Financial Institutions / Banks had already agreed in principle to accept the One Time Settlement Scheme offered by the Company and even if there was some differences as to payment of 100% of principal amount in cash as allegedly demanded by the Financial Institutions / Banks and 75% payment in cash and balance 25% payment in the form of equity as suggested by the Company, the difference was not such that it could not be bridged by negotiations. Mr. Shah has further submitted that AAIFR has also failed to appreciate that even the Operating Agency had indicated to the Company that the Company's One Time Settlement proposal was agreeable to the Financial Institutions / Banks and that, to show their bonafides, the promoters should deposit with it an amount of Rs. 50 Lacs. The AAIFR should have appreciated that pursuant to this suggestion and indication from the Operating Agency that the promoters had immediately deposited with the Operating Agency an amount of Rs. 28 Lacs in a "No Lien" account and the balance amount of Rs. 22 Lacs was assured to be deposited with about four days. The AAIFR took a very narrow and unjust approach and rejected the appeal of the petitioner by its order dated 02.01.2001.

15. Mr. Shah has further submitted that the petitioner Company has one of the most upto date plants for aluminium extrusion etc. in India. The petitioner commenced commercial production in January 1988 and during the period of list twelve years, the petitioner earned a very good name, both in the domestic as well as in the international markets. The petitioner has developed many import substitutes thereby saving for the nation substantial foreign exchange. The petitioner has been supplying precision products to many reputed concerns such as Modi Xerox, Electronic Racks for President System, Heat Sinks for M/s. Bharat Electronics / Ms ITI / Ahuja Radios, Surveyor Scales for CST Ltd. etc. The petitioner also caters to defence requirements; it also supplies aluminium sections for manufacturing ships, railways, etc. The petitioner also earned very good name for supplying irrigation tubes confirming to IS 7092 (Part II). The petitioner also supplied its aluminium sections for the purpose of bus-body building companies of great repute. The petitioner's products are also well accepted in international markets.

16. Mr. Shah has further submitted that BIFR and

AAIFR have totally failed to take into consideration that the petitioner is a going concern and employs very large number of persons. The petitioner directly employs about 200 persons and several hundreds more are employed by ancillary industries and establishments set up to supply materials and services to the petitioner. The petitioner pays a very large amount by way of wages and salaries. The relations between the petitioner and its workers have been very cordial and no dues of the workers are outstanding as on date. The petitioner has been paying the dues of the workers very regularly.

17. Mr. Shah has further submitted that the approach of the BIFR should have been to review a sick but viable industrial unit and not to kill a viable unit, particularly when the financial Institutions and Banks were ready and willing to accept the Company's proposal for settlement. By ordering winding up of a viable unit like that of the petitioner, it would be rendering hundreds of persons unemployed, the national exchequer would also lose huge amount. There would be loss of production and loss to national wealth. If the new unit such as that of the petitioner is to be set up, it would require a very huge amount and directing such a unit to be close down particularly when the Financial Institutions and Banks were ready to accept the rehabilitation scheme would be national waste and loss.

18. Mr. Shah has further submitted that even after the order passed by the AAIFR, the petitioner continued its efforts to revive the unit and has carried on negotiations with IDBI. The petitioner, therefore, submitted a latest revised One Time Settlement proposal on 26.02.2001 which was under active consideration of IDBI. The orders passed by BIFR and AAIFR rejecting the petitioner's appeal and confirming the BIFR's order are null and void and are required to be quashed and set aside.

19. Mr. Shah has further submitted that based on the Company's revised proposal even after the order of AAIFR, this Court has passed an order on 02.11.2001 wherein the fact regarding deposit of Rs.88.50 Lacs being 25% of the 354 Lacs was recorded. The Court has also recorded the statement of the learned advocate Mr. B.G. Jani appearing for IDBI, the Operating Agency that he has not received any contrary instructions and that the IDBI had agreed in principle to consider the One Time Settlement proposal. Mr. Shah has, therefore, submitted that once having accepted the One Time Settlement proposal and the petitioner having acted on the basis of the said proposal

and made the payment of 25% of the agreed amount for settlement, it is not open for the respondents to change their stand and insist for winding up of the petitioner Company. One Time Settlement envisaged payment of 354 Lacs with 25% down payment and balance 75% in six quarterly installments. There was no question of payment of any interest and the payment of balance 75% would be made only after sanctioning the Scheme and not before that. If the Operating Agency and other Secured Creditors did not fully accept the One Time Settlement, the petitioner would stand to lose a huge amount and would be at a great disadvantage. The amount which was deposited by the petitioner to show its bonafide and resourcefulness was to be kept in "No Lien" account. The IDBI has, pending the petition, illegally appropriated the said amount lying with it in a "No Lien" account. The IDBI is, therefore, required to put the said amount in "No Lien" account and if the One Time Settlement is not accepted either by IDBI or by any other Financial Institutions, the amount deposited in the "No Lien" account should be refunded to the petitioner so that the petitioner can in turn return the said amount to its associates and financers from whom the said amount was received with an assurance that the same be kept in a "No Lien" account. The IDBI in its letter dated 04.05.2001 has clearly stated that the Company has submitted a revised One Time Settlement proposal envisaging payment of Rs.353.64 Lacs towards principal with 25% down payment and the balance 75% in six quarterly installments without interest. Hence, there is no question of demanding any interest under that One Time Settlement proposal. Unless and until the Secured Creditors agree their acceptance to the One Time Settlement, the question of making payment to the installments as per the One Time Settlement does not arise.

20. Mr. Shah has lastly submitted that recovery applications filed by ICICI and Dena Bank before the D.R.T. are not maintainable. The said applications are filed on the basis of the old debt. No suit or recovery application can be filed on the basis of claims prior to the One Time Settlement. Even the contention of the IFCI is not correct. The petitioner was not required to pay any interest under the One Time Settlement. Even the installments for the balance amount of 75% of the balance amount of the One Time Settlement was to be paid in six quarterly installments without interest commencing after the Secured Creditors conveyed their acceptance of the One Time Settlement and the BIFR approve the same. The proceedings before the BIFR cannot be said to have been concluded. This Court has by its order dated 02.11.2001

stayed the operation of the order of the BIFR and AAIFR forming an opinion that the petitioner Company should be wound up. Even at present, there is no order of the BIFR recommending winding up of the petitioner Company and the matter can be said to be still pending before BIFR. He has, therefore, submitted that the petition be allowed and the matter may be sent back to BIFR to consider the revised proposal of the petitioner and pass appropriate order thereon.

21. Mr. B.G. Jani, learned advocate appearing for I.D.B.I. has submitted that the petitioner Company has failed to act as per the Scheme sanctioned by BIFR. On earlier two occasions, the Scheme was sanctioned and the same have failed because of non-fulfillment of the commitments by the petitioner. Even with regard to the third Scheme, the petitioner could not make the payment within the stipulated period and hence, BIFR has confirmed its prima facie opinion and forwarded the same to this Court for winding up of the Company and appeal filed against the order was also dismissed by AAIFR. However, by virtue of the stay granted by this Court, the winding up petition which was registered on the basis of BIFR's opinion being Company Petition No. 256 of 2000 could not be proceeded further. He has further submitted that after having considered the proposal for negotiated settlement of the dues of the petitioner Company, the IDBI wrote a letter dated 20.11.2001 informing that the IDBI is agreeable in principle to accept the proposed compromise of settlement i.e. payment of total amount of Rs. 98 Lacs being 25% of the settled amount be paid as down payment after acceptance of the proposal by the Financial Institutions / Banks and balance amount of 75% in six quarterly installments commencing from 01.07.2001 carrying interest at the rate of 12% p.a. with quarterly rests (2) waiver of entire simple interest, compound interest and liquidated damages till cut-off date i.e. 30.06.2001.

22. Mr. Jani has further submitted that the petitioner Company did not honour its commitment as per the negotiated settlement of the dues on the terms and conditions stated in the aforesaid letter. The IDBI has informed the petitioner Company that a settlement arrived at on the basis of the negotiated settlement proposal stood withdrawn and accordingly the reliefs and concessions granted to the petitioner were also revoked and status-quo ante was restored. The petitioner was further informed that the amount of the due payment made by it and kept with the respondent No. 4 has been adjusted towards the outstanding dues as per the original

liability. All these facts were intimated to the petitioner Company vide letter dated 24.07.2002.

23. Mr. Jani has further submitted that the petitioner Company has not fulfilled its commitments originally under the One Time Settlement Scheme before the BIFR when the reference was pending and thereafter under the proposal for negotiated settlement, though the IDBI being an Operating Agency had all throughout considered the financial difficulties of the petitioner Company and agreed in principle to settle the dues in terms of the One Time Settlement and also in term of the negotiated settlement proposal offered by the petitioner Company itself. This Court had granted interim relief considering the bonafides of the petitioner Company to settle the dues of the Secured Creditors and other Financial Institutions and Banks and considering that the petitioner Company had paid total sum of Rs. 88.50 Lacs against the total dues of Rs. 354 Lacs. After making payment of the said amount, the petitioner Company has not paid the balance 75% amount in equal six quarterly installments as contemplated under the Scheme. The petitioner Company has, therefore, not fulfilled its obligations under the proposal for negotiation of the settlement of the dues and hence, IDBI was constrained to withdraw what was granted, on account of the failure of the Company for fulfilling its commitments under the Scheme under the negotiated settlement proposal. Since the IDBI has already withdrawn the agreement of negotiated settlement of the dues, it would be just, proper and in the interest of justice to pass the winding up order on the basis of the opinion forwarded by BIFR which is confirmed by AAIFR.

24. Mr. Jani has further submitted that when two expert bodies have already expressed and/or confirmed their views, it is not open for this Court while exercising its power under Article 227 of the Constitution of India to interfere in the said order and substituted its own decision in place of the decision taken by such specially constituted authorities. The petitioner Company has not made payment of balance amount though accepted under the pretext that the installments have not become due and payable as the One Time Settlement Proposal, it has been principally agreed by the Operating Agency, has not been sanctioned. This is malafide excuse of the petitioner Company stating that the installments payable under the One Time Settlement have become payable only on the scheme being sanctioned. The petitioner Company has made it very clear in its letter dated 01.10.2002 that the petitioner Company was

ready and willing to comply with the terms and conditions mentioned in the One Time Settlement Proposal, which has been accepted by the Operating Agency in principle. Having accepted to comply with the terms and conditions mentioned by the Operating Agency in its letter dated 20.11.2001, it is totally malafide stand of the petitioner Company not to make the payment accordingly. This is nothing but a strategy to buy time and to earn a profit by continuing the manufacturing activity without accepting the corresponding liability to make the payment under One Time Settlement Scheme.

25. Mr. Jani has further submitted that the petitioner Company has taken further dishonest stand that the balance amount of 75% of the total amount of Rs.354 Lacs will be paid by the petitioner Company only on sanctioning of the settlement by BIFR. This is absolutely dishonest stand of the petitioner Company as nowhere it was stated in the settlement proposal that this proposal is required to be sanctioned by BIFR. Even otherwise, question of sanctioning the settlement by BIFR does not arise as BIFR had already confirmed its opinion that the petitioner Company is required to be wound up and the same has been confirmed by the order of AAIFR. There was no question that the One Time Settlement Scheme is required to be sanctioned and finally accepted by BIFR. The proceedings before BIFR were concluded by the orders passed by BIFR confirming its opinion to wound up the Company.

26. Mr. Jani has further submitted that other Financial Institutions, namely, ICICI has filed Recovery Application bearing O.A. No. 229 of 2003 before the Debts Recovery Tribunal at Mumbai and Dena Bank has also filed recovery application being O.A. No. 66 of 2004 before the D.R.T., Mumbai. The other Financial Institutions, namely, IFCI had initially conveyed its final acceptance of the One Time Settlement proposal by its letter dated 29.11.2001 wherein also the petitioner Company had to make 25% of the settled amount as down payment and balance 75% in six quarterly installments with interest @ 12.5% p.a. from 01.07.2001 with quarterly rests. Mr. Jani has further submitted that the Company in its letter dated 24.03.2004 has clearly in unequivocal terms stated that One Time Settlement has been duly considered and approved by all the Secured Creditors and is waiting for only formal approval of BIFR. The stand taken by the petitioner Company is absolutely unreasonable, dishonest and malafide only with a view to see that the petitioner Company has not to make the payment and if at all it has to make the payment, it

should defer for indefinite period. The BIFR had also given ample opportunity to the petitioner Company to revive and to make the payment as per the One Time Settlement Scheme. The proposal for Settlement under One Time Settlement Scheme was also placed by the Company during the pendency of proceedings before BIFR. However, the petitioner Company had not fulfilled its obligations under One Time Settlement Scheme offered by itself. He has, therefore, submitted that the petition filed by the petitioner Company is required to be dismissed with heavy compensatory cost and stay granted by this Court is required to be vacated so that the order passed by BIFR and confirmed by AAIFR can properly be operated and implemented and winding up proceedings against the Company can be started in accordance with the provisions of law.

27. After having heard learned advocates appearing for the respective parties and after having gone through the orders passed by the BIFR as well as AAIFR and after having considered the pleadings of the parties as contained in the petition, affidavit-in-reply and the affidavit-in-rejoinder and also after having considered the records and proceedings before the BIFR and AAIFR, and various proposals and schemes submitted by the petitioner for settlement, the Court is of the view that the Company is facing the financial crisis right from 1990 onwards. The two petitions which are pending before this Court are filed in the year 1990. The reference was registered before BIFR in 1992. Twice the Scheme was sanctioned and twice it has failed. This is a third attempt made by the petitioner Company before BIFR and proposal for One Time Settlement was submitted which was duly considered by the Operating Agency as well as by the Financial Institutions. The petitioner Company was not in a position to even pay an amount of Rs. 50 Lacs and because of that non-payment of the agreed amount, the BIFR has confirmed its prima facie opinion for winding-up of the Company. The BIFR in its order dated 01.09.2000 has held that the Company / Promoters had submitted a sketchy proposal on 22.08.2000 incorporating only the One Time Settlement amount as the cost of the Scheme. The Company / Promoters had envisaged waiver of amount of interest, simple interest, liquidated damages and almost 50% of even the principle amount. IDBI, ICICI, IFCI and Dena Bank had indicated that they would not accept anything less than 100% principal amount, whereas the Company / Promoters had clearly stated that they could offer only Rs. 354 Lacs by way of One Time Settlement and could not increase the amount any further. The BIFR has further observed that the Company had been before the

Board since 1991 and two rehabilitation Schemes sanctioned in 1992 and 1996 had to be declared as failed since the Company / Promoters had failed to implement the Scheme. No other party had evinced interest in taking over the Company for rehabilitation and hence, a show-cause notice for winding up of the Company was issued. Even on that date, the Company / Promoters were at liberty to come up with a fully tied up and accepted proposal which could have been considered, but they had failed to do so. The Board, therefore, has taken the view that the Promoters were not serious in rehabilitating the Company nor were they resourceful enough to mobilize the fund required for this purpose. As such there was no rehabilitation proposal with means of finance fully tied up, for consideration of the Board despite ample opportunities having been given to all concerned. The Board, therefore, confirmed the prima facie opinion that the sick industrial company was not likely to make its net worth exceed its accumulated losses within a reasonable time while meeting all its financial obligations and that the Company as a result thereof was not likely to become viable in future and hence, it was just, equitable and in public interest that it would be wound up under Section 20 (1) of the Act.

28. Though the above opinion of BIFR was challenged by the Company before AAIFR, the AAIFR has also observed that it is clear from BIFR's proceedings and order dated 01.09.2000 that no agreement was reached between the Company / Promoters and the Banks / Financial Institutions regarding the terms of settlement of outstanding dues. The Creditors wanted payment of 100% of principal dues in cash which the Company / Promoters were not prepared to ensure. The AAIFR, therefore, did not see any error on the part of BIFR in not granting further time particularly when two Schemes had already failed and thereafter sufficient time had also been given to the Company / Promoters to negotiate the terms of settlement with their Secured Creditors. The AAIFR has also observed that even during the pendency of the appeal, the AAIFR had accorded further opportunity to the Company to negotiate its One Time Settlement offer with the Financial Institutions / Dena Bank. The position before the AAIFR was that the Company was not willing to offer more than Rs. 354 Lacs payable over eight quarterly installments by way of full and final settlement of the dues of the Financial Institutions / Dena Bank. The representatives of IDBI and Dena Bank stated that the said offer was not acceptable to them. The AAIFR took the view that there was no basis for working out any workable rehabilitation scheme for the

Company. The AAIFR has further observed that according to the Company, the principal dues were Rs. 5.77 Crores and the amount of Rs. 2.23 Crores has already been paid in the past and hence, the balance amount payable towards the principle dues was only Rs. 3.54 Crores and the Promoters were not in a position to offer higher amount as One Time Settlement. The representatives of IDBI and Dena Bank have stated that the amounts paid earlier were towards part of the earlier installments which were due in accordance with the scheme/agreement reached earlier and those amounts cannot be adjusted against the outstanding principal dues at present. According to the representatives of IDBI and Dena Bank, the principal dues work out to Rs. 6.04 Crores and they were willing to consider waiver of the arrears of interest if the Company agree to pay the aforesaid principal amounts over eight quarterly installments along with interest on deferred amounts i.e. on reducing balances. The AAIFR has, therefore, held that there was a dispute even with regard to the outstanding principal dues. In any case, as the One Time Settlement offer of Rs. 3.54 Crores was not acceptable to Dena Bank / Financial Institutions, it was not possible to prepare any workable rehabilitation scheme for the Company and hence, the AAIFR did not see any ground for interference in the order of BIFR and appeal was accordingly dismissed.

29. Even before this Court, when the petition was admitted and interim relief was granted on 02.11.2001, it was only on condition that the Company has made total payment of Rs. 88.50 Lacs which was 25% of Rs. 354 Lacs and the balance amount was to be paid in six quarterly installments. Thus, in any case, the said payment was to be made by the Company within the period of one and half years from the date of the said order. Instead of making such payment, the petitioner has raised a lame excuse that the balance 75% was to be paid only after the One Time Settlement Scheme was agreed and accepted by the Financial Institutions / Banks and decision to that effect is communicated by them. It is very unhappy and unfortunate state of affairs that though the petitioner Company has availed of the interim relief for the last more than three and half years, no payment was made towards its commitment and such excuses were canvassed before this Court. The Court, therefore, does not see any genuine or bonafide desire on the part of the petitioner Company to make the payment even as per its own commitment to the Banks / Financial Institutions. Even if for the sake of argument, the Court ignores the contention raised on behalf of the Operating Agency and the Financial Institutions with regard to the exact

outstanding amount or even with regard to the payment to be made with interest @ 12.5%, the petitioner Company was and is under an obligation to make the payment of 75% of the amount within the period of one and half years in six quarterly installments. If there was any dispute or ambiguity about this condition, the petitioner Company should have approached this Court and should have sought the necessary clarification in the matter. Instead of that the petitioner Company has chosen to remain silent and not to make any payment to the Financial Institutions / Banks. The Court is, therefore, of the view that there is no scope for revival of the Company. There may be a good track record of the Company in the past. However, for the last 15 years, the Company has been facing very severe financial crunch. If the Secured Creditors, Financial Institutions and Banks are not paid their dues in time, it would affect their financial stability too. Simply because the Company is engaging itself for some manufacturing activities or the workers are paid their wages in time, despite the fact that no evidence to this effect was produced before the Court, it does not relieve the Company from making payment or honouring its commitment to pay the agreed amount to the Banks / Financial Institutions. In such a situation, if the BIFR and AAIFR have not found any justifiable reason to approve the Scheme, this Court while exercising its writ jurisdiction under Article 227 of the Constitution of India is not inclined to substitute its decision with the decision of these two authorities.

30. In view of the above facts and circumstances of the case and in view of the fact that the Court is in agreement with the view taken by BIFR and AAIFR that it is not possible to prepare any workable rehabilitation Scheme for the Company, the Court does not want to interfere in the impugned orders passed by the authorities below. The petition is, therefore, dismissed. Rule discharged without any order as to costs. Interim relief granted earlier by this Court is hereby vacated.

31. Since the petition is dismissed, C.A. No. 5466 of 2004 does not survive and is accordingly disposed of.

32. Since the petition is dismissed, necessary orders will have to be passed in Company Petition No. 256 of 2001 which is registered on the basis of BIFR opinion, along with Company Petition Nos. 131 & 132 of 1990. The Office is, therefore, directed to place Company Petition No. 256 of 2000 along with Company Petition Nos. 131 & 132 of 1990 for the purpose of admission and

advertisement on 29.04.2005.

33. At this stage, Mr. Ashok L. Shah, learned advocate appearing for Mr. Godiawala for the petitioner has requested that the order passed by this Court today may be stayed for two weeks so as to enable the petitioner to approach the higher forum. The stay granted by this Court is in operation till this date and no objection is raised by the other side for staying this order for two weeks. Hence, the request is granted. The impugned order passed by this Court today is stayed upto 09.05.2005.

[K.A. PUJ, J.]

#Savariya#

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